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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES C. HASTINGS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari
to the United States Court Of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas K. Maher, Esq.
RUDOLF & MAHER, P.A.
312 West Franklin Street
Chapel Hill, North Carolina 27516
(919) 967-4900

Attorney for Petitioner Hastings

October 1997

47 pp

QUESTIONS PRESENTED

I. WHETHER THE UNITED STATES COURT OF APPEALS ERRED IN HOLDING THAT PROOF OF IMPERMISSIBLE SELECTION FOR PROSECUTION BY INVESTIGATING AGENTS IS IRRELEVANT IN ASSESSING WHETHER A DEFENDANT IS ENTITLED TO DISCOVERY ON WHETHER HE HAS BEEN UNCONSTITUTIONALLY SELECTED FOR PROSECUTION.

II. WHETHER THE UNITED STATES COURT OF APPEALS ERRED IN HOLDING THAT A CITIZEN WHO ATTAINS PROMINENCE THROUGH THEIR POLITICAL ACTIVITY MAY BE SELECTED FOR CRIMINAL PROSECUTION BASED UPON THAT PROMINENCE.

III. WHETHER, IN FINDING THAT EXPLICIT REFERENCES TO PETITIONER'S POLITICAL ACTIVITY COMBINED WITH STATISTICAL EVIDENCE AND EVIDENCE FROM PERSONS WITH PERSONAL KNOWLEDGE OF PROSECUTORIAL PRACTICES INDICATING THAT PERSONS SIMILARLY SITUATED TO PETITIONER HAD NOT BEEN PROSECUTED DID NOT JUSTIFY DISCOVERY ON PETITIONER'S CLAIM OF SELECTIVE PROSECUTION, THE UNITED STATES COURT OF APPEALS IMPROPERLY APPLIED THIS COURT'S HOLDING IN *UNITED STATES V. ARMSTRONG*, 116 S. CT. 1480 (1996).

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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James C. Hastings respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the appendix (Appendix A, pp. 1a-13a).

JURISDICTIONAL STATEMENT

The United States Court of Appeals reversed the District Court's dismissal of Petitioner's indictment on September 17, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On September 9, 1995, shortly after his election to the chairmanship of the North Carolina Republican Party, Petitioner James Hastings was indicted on four counts of failure to file tax returns. For two of the four years in question, Petitioner was owed substantial refunds by the government. Petitioner filed a timely motion to dismiss for selective prosecution. The district court granted Petitioner's request for discovery on the issue of selective prosecution. The government, although blatantly refusing to comply with the court's order in a number of serious respects, did provide some of the requested discovery. The government then refused to provide further discovery, including information about the standards used for determining whether a delinquent taxpayer will be subjected to criminal or civil proceedings, and the district court dismissed the indictment. The dismissal was premised both upon the government's explicit refusal to provide this discovery, and the government's bad faith in responding to

the discovery orders, which the government conceded resulted in prejudice to Petitioner.

At the time the district court dismissed the indictment, it was aware of the following information:

In October, 1991, an IRS computer generated a Taxpayer Delinquency Inquiry due to Petitioner's failure to file returns for 1988 and 1989. Revenue Agent Schmidt was assigned to the matter, and discovered that Petitioner had a credit balance of $45,000.00 resulting from overpayments in 1987, which Petitioner directed be applied to his 1988 return, and estimated payments made in 1988. Revenue Agent Schmidt calculated that Petitioner would owe approximately $7,000.00 for 1988, 1989, and 1990 combined. Agent Schmidt never spoke to Petitioner to find out why the returns were not filed.

In late 1992, Petitioner was elected to the chairmanship of the Watauga County Republican Party. On January 13, 1993, Agent Schmidt referred the matter to the IRS Criminal

Investigation Division for criminal investigation. In making the referral, Schmidt noted that Petitioner had a "substantial credit" for 1988. Schmidt's report further noted that Petitioner owned several fast food restaurants, and had filed returns in the past. Schmidt's report then observed that the income shown on the IRS documents was "low," but recommended a criminal investigation nonetheless, based in part upon the fact that "several people at the courthouse indicated that [Petitioner] has connections to Jim Gardner who ran for Governor in the last election."

Statistics belatedly produced by the government in response to the discovery order vividly demonstrated the rarity with which any delinquent taxpayer is referred for criminal investigation. Although there were 37,000 Taxpayer Delinquency Inquires issued during the relevant time period to the District Office that handled Petitioner's case, only twelve were ever referred for criminal investigation. Only one of these resulted in a criminal prosecution. An affidavit from an

attorney who represented delinquent taxpayers confirmed that even taxpayers who are delinquent for several years and who owed substantial taxes are not subjected to criminal prosecution, while an affidavit from a former Special Agent with the IRS Criminal Investigation Division who was familiar with the facts of Petitioner's case attested to the fact that such taxpayers had not been prosecuted in the past.

Despite the fact that the IRS believed that Petitioner's taxes were "low," the CID conducted a criminal investigation. The Special Agent in charge of the investigation, Agent Combs, began by investigating Petitioner's political connections. Agent Combs interviewed a local police officer, who had no information about Petitioner's tax affairs, but was able to provide the following information:

> [Petitioner] is well known in Watauga County and throughout the state in the Republican party. He has affiliations with ex-Lieutenant Governor, James Gardner and other prominent Republicans. Hastings is also very close to the Sheriff of Watauga County, "Red" Lyons.

In March, 1993, Agent Combs interviewed Petitioner

and his CPA, who had obtained an extension for the 1991 return until October, 1992. The CPA informed Agent Combs that Petitioner intended to file returns, which the CPA could not finalize for several months because of their complexity. Agent Combs agreed to the CPA's request that the returns be filed after tax season. Agent Combs was further informed that Petitioner believed that he would owe no taxes; a prediction that proved true for 1988 and 1989, but not for 1990 and 1991. Indeed, the CPA had signed and filed requests for extensions for each of these years in which the CPA swore that Petitioner would owe no taxes. Petitioner also believed he would be entitled to significant tax credits; a belief that would have been well founded had the returns been timely filed, although the delay in filing the returns resulted in the loss of these credits. The returns were filed, and all taxes and interest paid in full.[1]

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[1] The total gross income on the returns was significant, in excess of seven million dollars, but this was due to the fact that Petition ran his fast food restaurants as a sole proprietor and all of the gross receipts were reported as gross income, and the costs of the food and labor were then subtracted. The total tax owed was approximately $150,000, some of which was due to the loss of tax credits. Both of the

CID nonetheless referred the matter to the Department of Justice for prosecution. In a memorandum written following the recommendation for prosecution, Agent Combs wrote the following:

> [PETITIONER] is well-known in Watauga County, North Carolina and in the political arena in North Carolina. For many years, [PETITIONER] has been heavily involved in Republican party political activities, and has held several political appointments. He was the director of the state Travel Development Section from February 1973 until April 1975. He left the position to devote more time to the presidency of the Jaycees North Carolina Chapter. In 1987 Governor Martin appointed [Petitioner] to the NC Zoological Park Council. In 1991, he was appointed the director of the Economic Development Board and the State Department of Economic and Community Development. [Petitioner] personally owns and is a partner in a business that owns several pieces of real property in and around Watauga County. During late 1993, [Petitioner] semi-retired from all of his business endeavors and turned the management of The Hastings Company over to his son-in-law. He made this move so that he could become more involved in

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affidavits submitted by persons with knowledge of prosecutorial practices indicated that persons with multiple years of non-filing and substantial taxes owed were not subject to criminal prosecution absent indications of fraudulent intent, which were not present in Petitioner's case.

> the political arena. On May 20, 1995, [Petitioner] was chosen for the position of Chairman of the Republican Party in North Carolina, to lead the party in the 1996 elections.

This memorandum was accompanied by news clippings about Petitioner's selection as chairman of the State Republican Party and his role in the upcoming elections. Although the government failed to provide any documentation from the Department of Justice concerning their evaluation of the case, the government conceded that there were references to Petitioner's political activities in those documents as well.

The district court found that there was evidence that Petitioner's prominent position within the Republican Party was a strong motivation for resulting prosecution, and that he was entitled to discovery. The government provided some of the requested discovery, but refused to provide the portion of the IRS Law Enforcement Manual that set forth standards relating to the selection of delinquent taxpayers for criminal, as opposed to civil, proceedings. The government conceded, however, that those standards would not support prosecution of Petitioner for

two of the four years covered by the indictment. The district court then dismissed the indictment.

The United State Court of Appeals for the Fourth Circuit reversed. The Court made several significant holdings in finding that the district court erred in ordering discovery; the Court held that the evidence of improper selection by the IRS investigative agents was not relevant in assessing whether the ultimate prosecution was tainted by unconstitutional selection, that selection based upon political prominence was acceptable, and that the evidence before the district court was not sufficient to establish either that Petitioner was selected due to his political activity or that similarly situated persons were not prosecuted. Each of these holdings merits review by this Court.[2]

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[2] The Court also found that dismissal was not warranted as a sanction for the government's bad faith in responding to the orders of the district court, although it upheld the finding of bad faith and held that a lesser sanction would be appropriate.

REASONS FOR GRANTING THE PETITION

I.

IN HOLDING THAT IMPROPER SELECTION FOR CRIMINAL INVESTIGATION DOES NOT OFFEND THE CONSTITUTION UNLESS THERE IS FURTHER PROOF OF IMPROPER SELECTION BY THE PROSECUTORS THEMSELVES, THE FOURTH CIRCUIT REACHED A CONCLUSION IN CONFLICT WITH OTHER CIRCUITS AND DECIDED AN ISSUE THAT HAS NOT BEEN DECIDED BY THIS COURT

The Revenue and Special Agents involved in the investigation of Petitioner showed an inordinate interest in his political affiliations, and made specific reference to his political activity and prominence as justifications for a criminal investigation that would otherwise have not been justified by the income taxes they believed Petitioner owed. The Fourth Circuit rejected this as a basis for granting discovery as to whether the prosecution of Petitioner was based upon unconstitutional selection. Although the Court agreed that selection of a citizen for prosecution based upon political activity would be unconstitutional, the Court held that the

improper motivation of the investigating agents was not a relevant consideration. The Court explained its holding as follows:

> [E]ven if there were some evidence of political animus on the part of the IRS's civil or criminal division there is no evidence that the government official who actually made the decision to prosecute the case was motivated by impermissible considerations. We will not impute the unlawful biases of the investigating agents to the persons ultimately responsible for the prosecution. *See United States v. Hendricks*, No1:96CR87, Slip op. (W.D.N.C. May 19, 1997)(declining to adopt a theory of "imputed vindictiveness" in assessing a selective prosecution claim); *United States v. Monsoor*, 77 F.3d 1031, 1035 (7th Cir. 1996)(holding that "the animus of a referring agency is not, without more, imputed to federal prosecutors"); *United States v. Goulding*, 26 F.3d 656, 662 (7th Cir. 1994)(finding that the relevant bias is that of the agents who actually make the decision to prosecute).

Slip Op at 7.

This holding addresses a key aspect of selective prosecution claims; whether impermissible selection for a criminal investigation taints the subsequent prosecution without evidence that the prosecutor shared the impermissible motives

of the investigating agent. In holding that the unconstitutional motives of the agents who investigated the case and recommended that the prosecutors take action is irrelevant, the Fourth Circuit reached a decision that is in conflict with decisions from other circuits, and which decides an issue that has not been clearly decided by this Court but which should be.

The United States Court of Appeals for the Tenth Circuit reached a directly contrary result in *United States v. PHE*, 965 F.2d 848, 859 (10th Cir. 1992), when it rejected a similar argument by the government. The Court stated that "[a]s a matter of law, moreover, even a good faith decision to continue a constitutionally tainted prosecution does not erase the taint when, as alleged here, the prosecution continues to utilize the fruits of the tainted behavior ... A prosecution tainted by impermissible prosecutorial or police misconduct is not cured by turning it over to a new prosecutor, or, even, a grand jury." The ruling in *PHE* is obviously the correct ruling. Any other rule would condone blatantly unconstitutional motivation

in selecting the targets of investigations as long as there was no proof that the prosecutor to whom the case was presented did not share in the unconstitutional motive. Prosecutors, by and large, do not select cases from the pool of all citizens who have committed the same offense, but rather chose from that pool of cases that law enforcement officers or investigating agents bring to them for review. Indeed, impermissible selection in the subjects of investigations is at least as problematic as impermissible culling by a prosecutor from a pool of otherwise untainted investigations. If the investigation is untainted, then an unbiased agent has already made a decision that the conduct is worthy of prosecution, and the chances that similarly situated persons are not subject to prosecution is slim. If the investigative decision itself is biased, the prosecutor is choosing from a tainted pool of cases, and their own personal lack of bias will not cure the defect.

Surely this court would not approve of the prosecution of members of one race who had been target for investigation

by law enforcement agents because of their race, simply on the basis that the prosecutor or grand jury was not aware of and did not share in this racial bias. Under the reasoning of the Fourth Circuit, however, such prosecutions would be beyond reproach.

PHE is not the only decision to recognize that improper motivation on the part of the investigating agency is sufficient to taint a prosecution when the agency convinces a prosecutor to go forward. In *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989), defendant brought a sex discrimination case against the EEOC, and then was subsequently indicted on tax charges. The Court held that vindictiveness on the part of the EEOC would taint the tax charges if it were shown that the EEOC had prevailed upon the DOJ to bring the charges, although the DOJ itself had no vindictiveness against the defendant.

The Fourth Circuit's rule not only conflicts with the ruling from the Tenth Circuit in *PHE* and the Sixth Circuit's holding in *Adams*, it is not supported by a fair reading of the decisions upon which it purports to rely. The Seventh

Circuit's decisions in *Monsoor* and *Goulding* were preceded by the decision in *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989), in which the Court held that vindictiveness on the part of the EEOC in prevailing upon the DOJ to institute criminal proceedings would justify dismissal of the indictment. The Court in *Monsoor* affirmed that *Adams* was stated the applicable law, and that dismissal would be warranted when an agent - acting with improper motivation - prevails upon a prosecutor to bring charges. The Seventh Circuit, then, recognized that improper motivation by the investigating agency can in fact taint a subsequent prosecution.

The split between the Fourth Circuit's decision in this case and the decisions of those circuits that recognize that a prosecution may be tainted by the motives of the investigating agents is over an issue of importance that this Court has not clearly addressed in the context of criminal prosecutions. As a practical matter, misuse of investigative discretion has at least as great a potential to infringe constitutional rights as misuse of

prosecutorial discretion. This case is a classic example of just that point; the prosecutors have no contact with the 37,000 taxpayers who are known to have filed delinquent returns and little way to evaluate whether the recommendation they receive from the IRS is motivated by impermissible considerations. Absent a decision by the IRS to push for criminal prosecution rather than civil penalties, Petitioner would never have been even considered for prosecution. A rule that shields investigative animus from review seriously undermines the protections offered by the constitutional proscription against impermissibly selective prosecution. The decision of the Fourth Circuit is therefore worthy of review.

II.

IN HOLDING THAT A CITIZEN MAY BE SELECTED FOR CRIMINAL PROSECUTION BASED UPON THEIR POLITICAL PROMINENCE THE FOURTH CIRCUIT DECIDED AN IMPORTANT ISSUE THAT HAS NOT BEEN DECIDED BY THIS COURT BUT SHOULD BE

IRS statistics demonstrated that a vast number of citizens do not file timely tax returns, and that only a minuscule

portion are subject to criminal investigation or prosecution. The evidence before the district court also demonstrated that Petitioner would not have been referred for criminal investigation had he not achieved political prominence. In reversing the district court, the Court of Appeals did not question the finding that Petitioner's political prominence supported his selection for criminal prosecution. Slip. Op at 7. Indeed, given the undisputed fact that the IRS had shown an explicit interest in Petitioner's political affiliations, going so far as to interview witnesses who were familiar with Petitioner's politics but had no knowledge of his tax affairs, and recommended prosecution for years in which the IRS guidelines did not support criminal sanctions, it would be hard to argue that Petitioner's status as a politician had no bearing on his status as a defendant. The court held, however, that prominence, even when due solely a citizen's involvement in politics, is a legitimate basis for selecting the citizen as a target of prosecution. The result is a ruling that allows a citizen's

exercise of protected First Amendment rights to act as a beacon for prosecutions that would otherwise not be brought, and allows prosecutors and agents who in fact wish to silence those with whom they disagree to claim that the prosecution was motivated by a desire to capitalize on the defendant's "prominence" rather than on the substance of the defendant's politics. This ruling addresses an issue that is of importance, but which has not been decided by this Court.

The Fourth Circuit's ruling grants tremendous power to prosecutors and agents; the power to chill the exercise of political activity as long as it claims it does so only to capitalize on the prominence of its target. As eloquently observed in *United States v. Berrios*, 501 F.2d 1207, 1209 (2nd Cir. 1974), "[s]elective prosecution then can become a weapon used to discipline political foe and the dissident ... The prosecutor's objective is then diverted from the public interest to the punishment of those harboring beliefs with which the administrator in power may disagree." If all it took for the

government to succeed in silencing political dissent was a claim that its only motive in targeting an outspoken political activist was to capitalize upon their prominence, the constitutional bulwark against the abuse of prosecutorial power would be weak indeed.

In addition, even if the prosecutor's motive truly was the benign desire to capitalize upon the citizen's prominence, and hence gain additional deterrent effect from the prosecution, the chilling impact of such selection criteria remains. Citizens who wish to exercise their First Amendment rights do so with the knowledge that the cost of the exercise of their constitutional rights is the potential that they will be subjected to criminal prosecutions that would otherwise not be brought.

The danger posed by allowing selection based upon prominence when that prominence relates to a status that itself would be an impermissible consideration should not be ignored. Under the Fourth Circuit's reasoning, the government could explicitly target prominent members of a race or religion and

justify this selection on the claim that they wanted to capitalize upon the defendant's prominence to increase the deterrent impact of the prosecution within a racial or religious group. This Court has never allowed such claims to justify the consideration of race or religion, nor should it allow such a claim to justify the consideration of political status in selecting citizens for criminal prosecution.

Although this Court has never addressed the issue of whether a citizen may be selected for criminal prosecution as a result of their political prominence unrelated to the offense, [3] at least one other court has held that a decision to select a person for criminal prosecution cannot be based upon prominence gained from the exercise of constitutional rights. In *United States v. McDonald*, 553 F. Supp. 1003 (S.D. Tx. 1983), the

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[3] The Court did hold that flagrant and public violators of the law may be selected for prosecution, *Wayte v. United States*, 470 U.S. 598 (1985), observing that "failing to proceed against publicly known offenders would encourage others to violate the law." Id at 613. Selection based upon a citizen's prominence as a law breaker, of course, is not the same as selection based upon the lawful exercise of First Amendment rights.

court held that the selection of a defendant for prosecution based upon his status as president of his union was impermissible when this status was unconnected to his role in the offense. The only decision to support the result reached by the Fourth Circuit is *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), in which the court held that "political prominence" is "not an impermissible basis for selection" as it makes "good sense to prosecute those who will receive the media's attention." 527 F.2d at 86. *Peskin*, however, reached this decision in the context of a prosecution of a former state legislator who was involved in bribing local officials, and without any analysis of the chilling effect that its blanket ruling could have. [4]

This Court has not addressed the issue of whether political activity, and its accompany prominence, justifies selection for

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[4] The other decisions cited by the Fourth Circuit, *United States v. Saade*, 652 F.2d 1126 (1st Cir. 1981) and *United States v. Ojala*, 544 F.2d 940 (8th Cir. 1976), involve prosecutions of persons who had prominently and publicly violated the law. Such prosecutions simply do not raise the issue raised in this case.

criminal prosecution when the activity is unconnected to the violation of the law being prosecuted. The power to make such selections is the power to chill the exercise of First Amendment rights, and this Court should review the Fourth Circuit's approval of such selection criteria.

III.

THE FOURTH CIRCUIT'S CONCLUSION THAT PETITIONER FAILED TO PRESENT SUFFICIENT EVIDENCE THAT SIMILARLY SITUATED PERSON WERE NOT SUBJECT TO PROSECUTION CONFLICTS WITH THIS COURT'S RULING IN *UNITED STATES V. ARMSTRONG*, 116 S. CT. 1480(1996)

Unlike many violations of the law, which must be dealt with either through criminal sanctions or not at all, failure to file a timely tax return can be dealt with through civil proceedings and sanctions. Petitioner presented statistical evidence that literally tens of thousands of tax payers who failed to file timely returns were known to the IRS but were not subjected to criminal sanctions. Indeed, the government conceded that half of the charges against Petitioner were for tax

returns for which internal IRS guidelines do not authorize criminal prosecution. Petitioner also presented evidence from persons with first hand experience with the practices of the IRS in selecting citizens for criminal prosecution that persons similarly situated to Petitioner were not subject to criminal prosecution. Specifically, former Special Agent Mathes provided an affidavit that revealed that he was familiar with the facts in Petitioner's case and that Petitioner's "situation is similar to the many taxpayers who file delinquent returns and who are not subject to criminal prosecution, but rather are dealt with on a civil basis." Similarly, Mr. Pinna, an experienced tax attorney, provided an affidavit that detailed his experience in representing tax payers who fail to file returns. According to Mr. Pinna, he had represented tax payers who had not filed returns for as long as ten years, or who had not filed returns for three years and owed in excess of $100,000.00, and who were dealt with civilly by the IRS, rather than through criminal prosecution.

Despite this extensive evidence[5], the Fourth Circuit held that Petitioner had presented insufficient evidence that similarly situated persons had not been subjected to criminal prosecution to warrant discovery. In reaching this conclusion, the Fourth Circuit ignored this Court explicit holding that all that was required of a defendant seeking such discovery is "a credible showing of different treatment of similarly situated persons." Instead of this test, the Fourth Circuit required proof that identically situated persons had not been subjected to criminal prosecution, a test that eviscerates the balance struck by this Court in *Armstrong*.

In *Armstrong* this Court struck a balance between the government's interest in vigorous prosecution and a citizen's interest in avoiding impermissible selective prosecution by requiring "some evidence to show the existence of the essential

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[5] The Court of Appeals also suggested that it would be proper to ignore evidence of improper selection that had been revealed by the government's partial compliance with the discovery order. This aspect of the ruling is in direct conflict with *United States v. Al Jibari*, 90 F.3d 22 (2d Cir. 1996), and to the extent it is the basis for the Fourth Circuit's ruling it is worthy of review.

elements" of a selective prosecution claim in order to be entitled to discovery. 116 S. Ct. At 1488, quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974). In *Armstrong* this Court concluded that the defendants, who claimed that they were selected for federal as opposed to state prosecution based upon their race, failed to present any evidence of similarly situated defendants of other races who were both known to the government and who received different treatment. The Court did not indicate that defendants would have to show that there were identically situated defendants - who had the same culpability for the same amount of drugs, and the same past criminal history - of other races who received more lenient treatment. Any such requirement would remove any "balance" between the interests of the government and the interest of the indicted citizen, making it impossible for anyone to even obtain discovery in a selective prosecution claim. Rather, this Court required proof of "individuals who were not black, could have been prosecuted for the offenses for which respondents were

charged, but were not so prosecuted." 134 L. Ed. 2d at 702. The Court made clear that this was not an "insurmountable" standard.

The Fourth Circuit clearly failed to apply this Court's holding that "some" "credible" evidence of similarly situated persons who had not been prosecuted would satisfy a defendant's burden in seeking discovery, and instead held Petitioner to the burden of proving that persons indistinguishable from him in all respects existed and had not been prosecuted. The court explicitly required proof that someone with "no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them" had received different treatment, relying upon its own prior decision in *United States v. Olvis*, 97 F.3d 739 (4th Cir. 1996). This required proof of identically, not similarly, situated defendants who had not been prosecuted, and raised the "insurmountable" bar that this Court in *Armstrong* refused to apply.

This Court sought to protect the legitimate interests of both the government and the targeted citizen in *Armstrong*. That balance ensures that impermissible selection in prosecution will be ferreted out without unduly hampering legitimate prosecutions. The standard as applied by the Fourth Circuit, however, undoes this balance by making the right to discovery in a selective prosecution claim a chimera. The Fourth Circuit's decision is in conflict with *Armstrong* and should be reviewed.

CONCLUSION

Petitioner presented credible evidence that he was prosecuted for offenses that are typically dealt with through civil proceedings, and that the decision to select him for prosecution was made after explicit consideration of his political ties. The Fourth Circuit's reversal of the district court's order that the government provide discovery relevant to Petitioner's selective prosecution claim is premised upon flawed holdings that the impermissible motives of the

investigating agents are irrelevant, that it is permissible to select politically active citizens for prosecution as long as the government claims to only be interested in capitalizing upon their prominence, and that a defendant seeking discovery must identify identically situated persons who were not prosecuted simply to obtain discovery on the issue of selective prosecution. All of these rulings are worthy of review by this Court.

Respectfully submitted this the 16 day of February, 1998.

Thomas K. Maher
RUDOLF & MAHER, P.A.
312 W. Franklin Street
Chapel Hill, N.C. 27516
(919) 967-4900

Attorney for Petitioner Hastings

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JAMES C. HASTINGS,
Defendant-Appellee.

No. 96-4462

Appeal from the United States District Court
for the Western District of North Carolina, at Statesville.
Richard L. Voorhees, Chief District Judge.
(CR-95-37-V)

Argued: March 6, 1997

Decided: September 17, 1997

Before MURNAGHAN, ERVIN, and WILKINS, Circuit Judges.

Reversed and remanded by published opinion. Judge Ervin wrote the opinion, in which Judge Murnaghan and Judge Wilkins joined.

COUNSEL

ARGUED: Karen Marie Quesnel, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Thomas Kieran Maher, RUDOLF & MAHER, P.A., Chapel Hill, North Carolina, for Appellee. **ON BRIEF:** Loretta C. Argrett, Assistant Attorney General, Robert E. Lindsay, Alan Hechtkopf, Scott A. Schumacher, Mark T. Calloway, United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington,

D.C., for Appellant. David S. Rudolf, RUDOLF & MAHER, P.A., Chapel Hill, North Carolina, for Appellee.

OPINION

ERVIN, Circuit Judge:

The United States indicted James C. Hastings for failing to file several years of federal income tax returns. Three decisions made by the district court are at issue in this appeal. First, the district court ordered the government to produce discovery related to Hastings' claim that he was selectively prosecuted because he is a Republican. Second, the district court ordered the government to disclose certain documents which the government argues are protected by the law enforcement privilege. Third, the district court ultimately dismissed the indictment against Hastings as a sanction for the government's failure to cooperate with the court's discovery orders. The government appeals each of these decisions. For the reasons hereinafter explored, we reverse the district court's decision to grant Hastings discovery on the issue of selective prosecution. We also reverse the dismissal of the indictment. We decline to reach the issue of privilege because it is made moot by our decision that discovery regarding selective prosecution was not warranted.

I

Hastings is a prominent businessman and Republican Party leader in Boone, North Carolina. He failed to timely file income tax returns with the federal government from 1988-1991. Hastings owed substantial taxes for some of those years and was entitled to a less substantial credit or refund in one of those years.

The Internal Revenue Service (IRS) began to investigate Hastings on the basis of a computer-generated referral in May 1992, which indicated he had failed to file returns. The resulting civil investigation revealed that Hastings had an earned interest and wage income alone of more than $170,000 during the years at issue; that he owns more than $610,000 in real estate; that he lives in a lavish home; that he is

partner in several business enterprises; that he owns a restaurant franchise; and that he had paid very few taxes for the years at issue through withholding and tax payments. The investigation did, however, show that Hastings had a substantial tax credit from an overpayment in 1987.

Based upon this information, the IRS began a criminal investigation. The official referral to the criminal investigatory unit within the IRS was made in January 1993. The referral form was completed by Revenue Agent Tanya Schmidt, who had been part of the initial civil investigation. In the section of the form allowing for "remarks," Schmidt mentioned the above listed factors. She also mentioned that Hastings has ties to Jim Gardner, a former Republican gubernatorial candidate. Schmidt acknowledged in the report that Hastings' income for two of the four years at issue was "low," implying that it was lower than the threshold for most criminal prosecutions; however, she noted that she nonetheless thought the case should be considered for prosecution because of Hastings' prominence in the community, because he owns a substantial amount of real estate, and because his behavior in the past indicated that he is aware of the income tax filing requirements.

When the Hastings case was transferred to the IRS's criminal division, it was assigned to Special Agent Lori Coombs. Coombs also investigated all aspects of Hastings' case. She interviewed, among other persons, Officer Kennedy of the Boone Police Department. Although he knew little about Hastings' tax law violations, he did tell Coombs that Hastings is a prominent Republican. Coombs also interviewed Schmidt, who told her that once Schmidt saw Hastings' lavish lifestyle she passed the case along to the criminal division for further action. Although Schmidt also told Coombs about Hastings being a prominent Republican, she did not say that this was a reason the case had been forwarded for criminal investigation.

Hastings was aware that the criminal division was investigating him and he was contacted and interviewed by IRS agents in the spring of 1993. In September 1993, several months after he had been informed of the investigation, Hastings finally filed the delinquent tax returns. The IRS's investigation ultimately revealed that Hastings had earned more than $7,000,000 in gross income during the years in

question, and had failed to timely pay more than $150,000 in taxes for the years 1990 and 1991. The IRS formally recommended prosecution of Hastings to the Department of Justice's Tax Division in November 1994. In a June 1995 memorandum written by Coombs regarding the Hastings investigation, she mentioned Hastings' political prominence and attached a newspaper article about Hastings' business life and political aspirations.

In 1995 the grand jury indicted Hastings for failure to file his tax returns. Hastings sought to have the indictment dismissed on the ground that he was being unfairly and selectively targeted for prosecution. In support of his request for discovery to support this claim, Hastings submitted the affidavit of Gary Mathes, who had been an IRS agent from 1973 to 1980. Mathes stated that, in his experience, most taxpayers who file returns delinquently are dealt with civilly rather than criminally. He stated that criminal prosecutions are only made when there are indicia of fraud on the part of the delinquent taxpayer.

In November 1995, the district court found that Hastings had made an adequate initial showing of selective prosecution and ordered the government to provide Hastings with discovery relevant to that claim. The government at first refused to comply with the discovery order and requested that the court withdraw it. The government then reluctantly provided much of the ordered discovery material, but did so in an untimely fashion, missing the deadline set by the court by several days.

Further, although the government provided Hastings with most of the requested discovery materials, it declined to turn over a portion of the IRS's Law Enforcement Manual. The government asserted that that portion of the Manual, known as LEMV, was protected by the law enforcement privilege because it contains confidential, sensitive information, the disclosure of which would hamper the government's ability to deter and prosecute tax evasion and other tax-related crimes. Ultimately, following extensive briefing, a hearing on the matter, and an *in camera* review of LEMV, the district court held that, although LEMV was privileged, the government had to provide it to Hastings because his need for the document outweighed the government interest in keeping LEMV secret. However, the government continued to

refuse to turn LEMV over to Hastings. Eventually, the indictment against Hastings was dismissed as a penalty for the government's repeated violations of discovery orders. The government then brought the instant appeal.

II

The government asserts that the district court erroneously granted discovery on the issue of selective prosecution. We recently made clear in *United States v. Olvis*, 97 F.3d 739, 743 (4th Cir. 1996), that we review a district court's decision to order discovery regarding a selective prosecution claim *de novo*, because we are addressing the "legal adequacy" of the evidence offered by the defendant.

A

The equal protection component of the Due Process Clause of the Fifth Amendment mandates that the decision to prosecute a particular criminal case may not be based upon an "unjustifiable" factor such as race, religion, or another arbitrary classification. *See United States v. Armstrong*, 116 S. Ct. 1480, 1486 (1996). A prosecution also cannot be motivated by a suspect's exercise of constitutional rights through participation in political activity. *See United States v. Marcum*, 16 F.3d 599, 602 (4th Cir. 1994); *United States v. Berrios*, 501 F. 2d 1207, 1211 (2d Cir. 1974). However, absent a substantial showing to the contrary, governmental actions such as the decision to prosecute are presumed to be motivated solely by proper considerations. *See Armstrong*, 116 S. Ct. at 1486; *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995).

A criminal defendant bears a heavy burden in proving that he has been selected for prosecution in contravention of his constitutional rights. A defendant "must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." *Armstrong*, 116 S. Ct. at 1487 (internal quotation marks and citations omitted). We have held, in a case concerning allegations of racially biased prosecution, that a defendant must establish "*both* (1) that similarly situated individuals of a different race were not prosecuted, and (2) that the decision to prosecute was invidi-

ous or in bad faith." *Olvis*, 97 F.3d at 743 (internal quotation marks and citations omitted) (emphasis added).

We have also held that similar standards apply when a defendant seeks discovery in support of a selective prosecution claim. Before a defendant can obtain discovery from the government on this issue, he or she "must produce 'some evidence' making 'a credible showing' of both discriminatory effect and discriminatory intent." *Olvis*, 97 F.3d at 743 (quoting *Armstrong*, 116 S. Ct. at 1488-89). As the Court made clear in *Armstrong* the evidentiary threshold required before discovery will be granted is a rigorous one, intended to be "a significant barrier to the litigation of insubstantial claims." *Armstrong*, 116 S. Ct. at 1486.

B

Applying these standards to the instant case, in order to affirm the district court's decision to grant discovery it is necessary for us to find that Hastings offered credible evidence to prove each of the two prongs of his selective prosecution claim. We find Hastings in fact satisfied neither prong of the test, and therefore we hold that the grant of discovery was inappropriate.

With respect to the intent prong set forth in *Armstrong*, Hastings offers two theories in support of his claim that his prosecution was the product of discriminatory intent. He first argues that the prosecution of his case was motivated by unconstitutional animus because he is a Republican. In support of this allegation he points to the memoranda written by the civil and criminal investigators of the IRS. In those memoranda Hastings was described as a prominent businessman, an active Republican, and someone with connections to certain Republican candidates for office. Hastings encourages us to find that the prosecutors were motivated by these facts in deciding to pursue a case against him. For several reasons, we conclude that Hastings' arguments are without merit.

First, none of the memoranda actually state that Hastings' political affiliation is the reason for pursuit of the case against him. For example, in the memo written by Schmidt when she forwarded Hastings' case to the criminal division, she mentioned that Hastings had con-

nections to a former candidate for governor. She did not say that those connections had anything to do with the decision to refer the case for criminal investigation. In fact, when Schmidt listed the reasons supporting pursuit of a criminal case against Hastings, she mentioned his expansive real estate and business holdings and the fact that he was certainly aware of his obligations under the tax laws. Schmidt's affidavit supports the conclusion that Hastings' property, substantial earnings, lifestyle and repeated failure to file tax returns led to the decision to prosecute. The other forms and memos upon which Hastings relies similarly described his political, business, and community prominence, but his party affiliation was never described as a reason for the prosecution.

Second, even if there were some evidence of political animus on the part of the IRS's civil or criminal division there is no evidence that the government official who actually made the decision to prosecute the case was motivated by impermissible considerations. We will not impute the unlawful biases of the investigating agents to the persons ultimately responsible for the prosecution. *See United States v. Hendricks*, No. 1:96CR87, Slip op. (W.D.N.C. May 19, 1997) (declining to adopt a theory of "imputed vindictiveness" in assessing a selective prosecution claim); *United States v. Monsoor*, 77 F.3d 1031, 1035 (7th Cir. 1996) (holding that "the animus of a referring agency is not, without more, imputed to federal prosecutors"); *United States v. Goulding*, 26 F.3d 656, 662 (7th Cir. 1994) (finding that the relevant bias is that of the agents who actually make the decision to prosecute).

Hastings' second argument with respect to discriminatory intent is that, even if he was not prosecuted because he is Republican, he satisfies this prong of the *Armstrong* test because the IRS improperly considered his general prominence in the community when deciding to prosecute. Hastings asserts that it is not permissible for prominence to be considered as a factor which militates in favor of prosecution, particularly when that prominence is due to a defendant's political activities. We do not agree.

It seems likely that Hastings' prominence in the community was a factor that supported, if not actually motivated, the decision to refer Hastings' case for possible criminal charges. However, Hastings

points us to no authority that supports the proposition that prominence itself is not a valid factor to weigh in favor of a criminal prosecution. In contrast, the government cites several cases in which courts have found that a person's public renown may be properly considered among other factors when deciding whether to pursue criminal sanctions for a violation of the law. For instance, in *United States v. Saade*, 652 F.2d 1126, 1136 n.14 (1st Cir. 1981), the First Circuit stated that the increased deterrent effect of prosecution of prominent figures is a legitimate consideration in favor of prosecution. *See also United States v. Catlett*, 584 F.2d 864, 868 (8th Cir. 1978) ("Since the government lacks the means to investigate and prosecute every suspected violation of the tax laws, it makes good sense to prosecute those who will receive, or are likely to receive, the attention of the media."); *United States v. Ojala*, 544 F.2d 940, 944-45 (8th Cir. 1976) (holding that the potential deterrent effect of prosecuting a well-known person is a valid consideration in the prosecutorial decision); *United States v. Peskin*, 527 F.2d 71, 86 (7th Cir. 1975) ("Assuming that the decision to indict Peskin and press for trial was based in part on considerations of his political prominence, this is not an impermissible basis for selection.").[1]

With respect to the discriminatory intent prong of the *Armstrong* test, we conclude that Hastings offers no information, aside from his own interpretation of the referral forms, to support his claim that his prosecution was motivated by discrimination or unconstitutional considerations such as his political activity. This is simply inadequate to satisfy his burden of proof on this issue.

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[1]Hastings attempts to distinguish *Ojala* and *Saade*, arguing that the defendants in those cases gained their political prominence in part through the activities for which they were being prosecuted, such as publicly refusing to pay taxes in protest of the Vietnam War. This is not a compelling distinction because the language of those decisions never says that prominence is only properly considered in such cases. Moreover, Hastings concedes that *Peskin* cannot be distinguished on this ground as the defendant in that case was a former state representative whose prominence was unrelated to his crimes.

C

The evidence Hastings provided the district court to prove the discriminatory effect prong of his selective prosecution claim is even less compelling. Hastings' evidence on this matter came entirely from the affidavit of a former IRS agent, Gary Mathes. Mathes stated that, based upon the information told him, presumably by Hastings or his counsel, Hastings' case is not the sort that is generally subject to criminal prosecution. The former agent also said that he knew of no similar cases which had been criminally prosecuted. This single affidavit is simply inadequate to sustain the "significant burden" of proof Hastings faces before being entitled to discovery.

In *Olvis*, 97 F.3d at 743, we discussed the relevant legal standard for determining when a pattern of prosecution has a discriminatory effect. A defendant must show that similarly situated persons outside of the constitutionally protected class are not being prosecuted. In determining whether persons are in fact similarly situated a court must examine all factors relevant to the government's decision to prosecute. *Id.* at 744. In *Olvis*, for instance, we found that many legitimate considerations justified prosecution of the indicted black defendants in the case but not the white co-conspirators, including the greater role in the conspiracy played by the black defendants and the white conspirators' voluntary cooperation with law enforcement. We held that "defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *Id.*

Given these stringent requirements, it is apparent that Hastings did not meet his burden of proof with respect to discriminatory effect. Hastings is unable to show that there were other persons with similar characteristics who were spared prosecution because of their political affiliation. In fact, he is unable to show that *any* other person not prosecuted has *any* of the characteristics identified by the IRS as warranting prosecution in Hastings' case, such as a lavish lifestyle, a significant tax debt, substantial earnings and property holdings, and clear knowledge of tax laws and obligations. Since the only evidence Hastings presented to the district court is that prosecution is not common for delinquent filers in the experience of a single former IRS

employee, he has not satisfied what is supposed to be a substantial evidentiary burden.

Hastings also offers statistical evidence to support his claim of discriminatory impact. We note that this evidence was not presented to the district court before it ordered discovery, but was in fact obtained as a part of the discovery provided by the government; therefore, we should not consider these statistics when deciding whether Hastings made the requisite initial showing to prove that he is entitled to discovery. *See* F.R.A.P. 10(a); *United States v. Russell*, 971 F.2d 1098, 1112 (4th Cir. 1992) (holding that a party may not rely, on appeal, on evidence which was not in the record before the district court). Even if these statistics had been before the district court when it made its decision, however, they do not sustain Hastings' burden of proof. The statistical evidence suggests that the IRS department which referred Hastings' case for criminal action referred only twelve of more than 37,000 delinquent filers for prosecution, and that only one case other than Hastings' had been prosecuted in the Western District of North Carolina.[2] Again, Hastings does not show that *any* of the thousands of persons not prosecuted had the same characteristics militating in favor of prosecution as Hastings. He also does not show that most, or even any, of the few persons who were pursued for criminal investigations were Republicans.[3]

We conclude that Hastings was unable to prove to the district court either element necessary to support his claim of selective prosecution, and he remains unable to provide the required proof even now. There-

[2]The time frame of these statistics is not clear from the record.

[3]Hastings similarly relies on an affidavit from William Pinna, a tax attorney. Pinna said that, in his many years of practice, all delinquent filers he had represented had been handled civilly, including one person who had failed to file returns for three years and owed more than $100,000. As with the statistics, however, Pinna's affidavit was not before the district court when it made its decision regarding discovery. Moreover, Pinna's affidavit does not show that the taxpayer he described as similar to Hastings was in fact similar in all respects relevant to prosecution. For instance, that person may have been unable to pay the delinquent taxes or unaware of his tax responsibility. Pinna's affidavit simply does not support Hastings' assertions.

fore, the district court erred when it ordered the government to provide discovery to Hastings on this issue. As we made clear in *Olvis*, the government should neither be subjected to adjudication nor discovery burdens on a selective prosecution claim unless the defendant can show both discriminatory intent and discriminatory impact. Neither showing was made in the instant case.

III

The government next argues that the district court erroneously dismissed the indictment against Hastings as a sanction for the government's refusal to provide complete discovery on the selective prosecution claim. The government specifically asserts that, because it should not have been ordered to provide discovery on the selective prosecution issue, it may not be sanctioned for its failure to comply with that order.

We agree that dismissal of the indictment was inappropriate, but we do not agree that the government should not have been sanctioned in any way. We review a district court's decision to sanction a party for discovery violations for an abuse of discretion. *See United States v. Muse*, 83 F.3d 672, 675 (4th Cir. 1996).

In the instant case, once the district court granted Hastings' motion for discovery on the issue of selective prosecution, the government had two options. It could have refused to comply with the discovery order, accepted dismissal of the indictment, and immediately appealed the issue. This was the option taken by the government in *Olvis*, 97 F.3d at 741. The other option open to the government was to comply with the discovery order in good faith having noted its objection, and save appeal of the issue for later, after the court had decided the merits of the claim of selective prosecution. Instead the government selected an improper third option when it both refused to comply in good faith with the discovery order because it did not agree with the district court's decision, and sought to avoid dismissal of the indictment. The government refused to comply with the court's order and compile certain pieces of documentation data regarding Hastings' selective prosecution claim until it had been ordered to do so several times. Even when the government did undertake to produce relevant evidence, it did so in an untimely fashion. This reluctant and recalci-

trant behavior does not satisfy the good faith standard to which the government must adhere when faced with a court order.

We hold, therefore, that it was not an abuse of discretion for the district court to sanction the government in some way for its recalcitrance. However, we further hold that dismissal of the indictment against Hastings was an extreme and inappropriate sanction. When a court sanctions the government in a criminal case for its failure to obey court orders, it must use the least severe sanction which will adequately punish the government and secure future compliance. *See United States v. Maples*, 60 F.3d 244, 247 (6th Cir. 1995); *United States v. Perez*, 960 F.2d 1569, 1572 (11th Cir. 1992). In determining a suitable and effective sanction, a court must weigh the reasons for the government's delay and whether it acted intentionally or in bad faith; the degree of prejudice, if any, suffered by the defendant; and whether any less severe sanction will remedy the prejudice and the wrongdoing of the government. *See Maples*, 60 F.3d at 247; *see also United States v. Shaffer Equip. Co.*, 11 F.3d 450, 463-64 (4th Cir. 1993) (employing similar factors in a civil context).

When these factors are applied in Hastings' case, it is clear that complete dismissal of the indictment was too severe a sanction to punish the government. Hastings is unable to show that he suffered prejudice beyond the inconvenience and slight expense of delays caused by the government's slow compliance. This relatively slight harm must be weighed against the public interest in seeing an alleged tax evader stand trial. A less severe sanction should have been considered by the district court in the instant case.

IV

Because we conclude that Hastings is not entitled to discovery on the selective prosecution claim, we need not reach the government's remaining contention on appeal. Specifically, the government argues that one of the IRS documents it was required to give to Hastings in discovery, LEMV, was privileged and therefore should have been protected from disclosure. However, that document was only relevant to Hastings' selective prosecution argument. Therefore we need not address whether the document would be specially protected from dis-

closure due to privilege were Hastings in fact entitled to discovery on this issue.

V

For the reasons explored above, we hold that Hastings is not entitled to pursue a claim of selective prosecution or to receive discovery on that claim. We further hold that the indictment against him should be reinstated, although the district court may, on remand, order a lesser sanction as a punishment for the government's discovery violations. Therefore the decision of the district court is

REVERSED AND REMANDED.